80-1565

No.

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In The

Supreme Court of the United States

OCTOBER TERM 1980

In re

GEIGER ENTERPRISES, INC.,

Debtor.

CENTRAL TRUST COMPANY ROCHESTER N.Y.,

Petitioner,

vs.

OFFICIALS CREDITORS' COMMITTEE OF GEIGER ENTERPRISES, INC., GEIGER ENTERPRISES, INC., AMOCO OIL COMPANY, AND THE UNITED STATES OF AMERICA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does §403(a) of the Bankruptcy Reform Act of 1978 preclude the indirect conversion of cases commenced under the prior Bankruptcy Act to a case under the present Bankruptcy Code, by dismissal of the Old Act case and immediate refiling under the present Bankruptcy Code? The United States Court of Appeals, for the Second Circuit, in a holding contrary to both the plain meaning and legislative history of §403(a), held that the statute is not violated by "dismissal and refiling" unless the creditors can show material prejudice.

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

All parties to the proceeding in the Court of Appeals are listed in the caption of the Petition. The United States of America was a co-appellee with Petitioner in the Court of Appeals, and supported the position of Petitioner.

LIST OF PETITIONER'S PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Petitioner is a banking corporation, incorporated under the laws of New York. Petitioner is a subsidiary of the Irving Bank Corporation. The following corporations are also subsidiaries of Irving Bank Corporation and affiliates of Petitioner:

1. Bank of Babylon;
2. Bank of Lake Placid;
3. The Citizens Central Bank;
4. Dutchess Bank & Trust Company;
5. Endicott Trust Company;
6. The First National Bank of Hancock;

7. The First National Bank of Moravia;
8. The Fulton County National Bank & Trust Company;
9. Hayes National Bank;
10. Irving Business Center, Inc.;
11. Irving Trust Company;
12. I.T.C. Capital Corporation;
13. The Merchants National Bank & Trust Company of Syracuse;
14. Nanuet National Bank;
15. Scarsdale National Bank & Trust Company;
16. Union National Bank.

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PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States Bankruptcy Court for the Western District of New York is unreported. The opinion of the United States District Court, Western District of New York, is

not officially reported, but is unofficially reported at 1 CBC 2d 1004. The opinion of the United States Court of Appeals for the Second Circuit is reported at 635 F.2d 106 (2d Cir. 1980). Copies of these opinions are in the Appendix at A-9, A-14, and A-1 respectively.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered October 29, 1980. A copy of the Judgment is in the Appendix at A-24. Petitioner filed a Petition for Rehearing, which the Court of Appeals denied by Order entered December 17, 1980. A copy of the Order denying the Petition for Rehearing is in the Appendix at A-26. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND FEDERAL RULES INVOLVED

The following statutes are involved in this case:

1. Section 403(a) of Title IV of the Bankruptcy Reform Act of 1978, Pub. L. 95-598:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

2. Section 403(b) of Title IV of the Bankruptcy Reform Act of 1978, Pub. L. 95-598:

> Notwithstanding subsection (a) of this section, sections 1165, 1167, 1168, 1169, and 1171 of title 11 of the United States Code, as enacted by section 101 of this Act, apply to cases pending under section 77 of the Bankruptcy Act (11 U.S.C. §205) on the date enactment of this Act in which the trustee has not filed a plan of reorganization.

3. Section 402(a) of Title IV of the Bankruptcy Reform Act of 1978, Pub. L. 95-598:

> Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

4. Rule of Bankruptcy Procedure 11-42(a):

> *Voluntary Dismissal or Conversion to Bankruptcy.* The debtor may file an application or motion to dismiss the case or to convert it to bankruptcy at any time prior to confirmation or, where the court has retained jurisdiction, after confirmation. On the filing of such application or motion, the court shall --
>
> (1) if the petition was filed pursuant to Rule 11-7, enter an order directing that the bankruptcy case proceed; or
>
> (2) if the petition was filed pursuant to Rule 11-6, enter an order adjudicating the debtor a bankrupt if he so requests, or, if he requests dismissal, enter an order after hearing on notice dismissing the case or adjudicating him a bankrupt whichever may be in the best interest of the estate.

5. Rule of Bankruptcy Procedure 11-42(d):

> *Effect of Dismissal.* Unless the order specifies to the contrary, dismissal of a case under this rule on the ground of fraud is with prejudice, and a dismissal on any other ground is without prejudice. A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to his property.

6. Rule of Bankruptcy Procedure 11-44(a):

> *Stay of Actions and Lien Enforcement.* A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court

proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

7. 11 U.S.C. §362(a):

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

STATEMENT OF THE CASE

This case presents the issue of whether a Chapter XI proceeding, commenced under the former Bankruptcy Act, former 11 U.S.C. §1 et. seq. ("Old Act") may be dismissed to allow the debtor to immediately file a Chapter 11 petition under the present Bankruptcy Code, 11 U.S.C. §101 et. seq., ("New Code") in light of §403(a) of Title IV of the New Code. §403(a) provides that cases commenced under the Old Act, and the substantive rights of the parties to such cases, shall continue to be governed by the Old Act as if the New Code had not been enacted. In this case, three courts have considered the issue, each coming to a different conclusion. The Bankrupcty Court held that §402(a) did not preclude the dismissal and refiling. The United States District Court for the Western District of New York reversed, holding that the dismissal and refiling constituted an impermissible circumvention of the plain meaning of §403(a) of the New Code. The United States Court of Appeals for the Second Circuit reversed and remanded for further hearings below, holding that dismissal of the Chapter XI would not be allowed if the substantive rights of petitioner and respondent United States of America would be materially prejudiced by the dismissal of the Chapter XI and subsequent filing under the New Code. If material prejudice was not shown on remand, the Second Circuit directed that the dismissal and refiling would be permissible.

On August 15, 1979, respondent Geiger Enterprises, Inc. ("Geiger") filed a petition in the U.S. District Court, Western District of New York, seeking relief under Chapter XI of the Old Act. The filing of the Chapter XI petition by Geiger is the basis of federal jurisdiction in the first instance. The case was assigned to Bankruptcy Judge McGuire. Geiger continued operating its business as a debtor in possession under §343 of the Old Act and Bankruptcy Rule 11-23. An Official Creditors' Committee was selected. No plan of arrangement has been submitted to the creditors as of the date this Petition was drafted.

On October 1, 1979, the New Code became effective, Pub. L. 95-598, Title IV, §402(a). On that date, the Old Act was repealed by §401(a) of the New Code. Despite this repeal, Congress expressly and succinctly dealt with the issue of what effect, if any, the New Code would have on cases commenced under the Old Act. §403(a) of the New Code provides that cases commenced under the Old Act would be conducted and determined as if the New Code had not been enacted and that the substantive rights of parties to such cases would continue to be governed by the Old Act as if the New Code had not been enacted.

After the New Code's effective date, seven corporations (Oilatomic, Inc., Willie the Whale, Inc., River Road Oil Co., Inc., Auto Stop Gas, Inc., Queen City Filling and Manufacturing, Inc., Hardrock Paving Co., Inc. and Budget Gas, Inc.) filed, at various times, petitions for relief under Chapter 11 of the New Code with the U.S. Bankruptcy Court, Western District of New York. Geiger claimed to own, directly or indirectly, all of the issued and outstanding stock of these corporations.

On January 9, 1980, Geiger moved to dismiss its Chapter XI petition on the representation that if the dismissal were granted, it would immediately file a petition under Chapter 11 of the New Code, and later make application to substantively consolidate the Geiger proceeding with all its subsidiaries and affiliates. The Bankruptcy Judge's Notice to Creditors (Appendix, A-28) provided as follows:

> NOTICE IS HEREBY GIVEN that a Meeting of Creditors . . . will be held . . . to consider and act upon the following:
>
> > AN APPLICATION OF Geiger Enterprises, Inc., the Debtor herein, to have its Petition, filed under Chapter XI of the Bankruptcy Act on the 15th day of August, 1979, and the within proceeding, dismissed.

> Said Application is made with the representation that if an Order is granted providing for the dismissal of the Petition and the proceeding herein, said Debtor will simultaneously with the entry of said Order, file a Petition under Chapter 11 of the Bankruptcy Code....

A hearing was held before the Bankruptcy Court on February 4, 1980, at which Petitioner, a secured creditor, and Respondent United States of America, holder of a substantial tax claim, appeared in opposition. After denying Petitioner's motion to dismiss Geiger's application as a matter of law, on the grounds that §403(a) of the New Code precluded such relief, the Bankruptcy Court granted Geiger's application to dismiss its Chapter XI proceeding. The dismissal Order (Appendix, A-12) was entered on February 8, 1980. Geiger's Petition for relief under Chapter 11 of the New Code was filed immediately after the dismissal Order was entered (Appendix, A-30). The Bankruptcy Court denied Petitioner's motion for a stay pending appeal to the District Court. On the same day, Petitioner and the Government filed Notices of Appeal to the U.S. District Court, Western District of New York, and moved for a stay pending appeal of the Bankruptcy Court's Order dismissing Geiger's Chapter XI proceeding. The stay was granted on February 9, 1980 by Order (Appendix, A-14) of the Hon. John T. Elfvin. In the same Order, Judge Elfvin directed an expedited argument of the appeal.

On February 29, 1980, by Memorandum and Order (Appendix, A-16), Judge Elfvin reversed the Bankruptcy Judge's Order dismissing Geiger's Chapter XI on the grounds that the dismissal and subsequent refiling under Chapter 11 of the New Code was an impermissible circumvention of §403(a) of the New Code. Thereafter, Geiger and Respondents Official Creditors' Committee of Geiger Enterprises, Inc., and Amoco Oil Company filed Notices of Appeal with the United States Court of Appeals for the Second Circuit. Alternatively, the same Respondents sought permission to appeal under 28 U.S.C. §1292(b). Permission was

granted by the Court of Appeals in a written Order dated July 21, 1980 (Appendix, A-22). Oral argument was heard on September 23, 1980, with the Court of Appeals Judgment (Appendix, A-24) being entered on October 29, 1980. The Court of Appeals reversed and remanded for further hearings on the question of prejudice to Petitioner and the Government, stating:

> The appellants do not contest that the new Code contains substantive changes, which could disadvantage the United States and Central. They argue, however, that the record does not support a finding that such prejudice is any more that hypothetical. We agree. Neither the Bankruptcy Judge nor the District Court considered this issue. We conclude that Rule 11-42(a) must be read in conjunction with section 403(a). If substantive rights of the United States or Central are in fact materially prejudiced then dismissal of Geiger's Chapter XI petition is not warranted. Assuming that such is not the case, then the Bankruptcy Court must determine whether or not consolidation is appropriate. *In re Geiger Enterprises, Inc.*, 635 F.2d 106, 109 (2d Cir. 1980) (Appendix, A-1 at A-7-8).

Prior to the issuance of the Court of Appeals mandate, Petitioner filed a Petition for Rehearing under F.R.A.P. Rule 40(a). The Petition for Rehearing was denied on December 17, 1980 (Appendix, A-26). Petitioner thereafter moved pursuant to F.R.A.P. Rule 41(b) to stay issuance of the mandate pending application to this Court for a writ of certiorari. This motion was denied on January 15, 1981. Although the Court of Appeals' mandate has issued, the hearings on the issue of prejudice to Central and the United States have not been held or scheduled. Geiger continues as a Chapter XI proceeding under the Old Act.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it seriously undermines the unambiguous rule of §403(a) of the New Code and provides a procedural device by which the clear Congressional intent is easily negated. The Second Circuit's holding conflicts with the plain meaning of §403(a) as well as its legislative history, and is predicated upon an improper interpretation of Bankruptcy Rule 11-42(a).

The federal question involved is of extreme importance and should be settled by this Court to provide uniformity nationwide. According to information received from the Administrative Office of the United States Courts, there were 126,661 open cases pending under the Old Act as of December 31, 1980. *FED. JUD. WORKLOAD STAT.*, Administrative Law Office of the United States Courts, Table F-1 (1981) (currently being printed). The Second Circuit's decision will only encourage Old Act bankrupts and debtors to utilize the "dismissal-refiling" device to attempt to obtain the substantive benefits of the New Code. A definitive decision by this Court, directing that §403(a) precludes indirect conversion of an Old Act case to a New Code case by use of a procedural device, will stem further litigation on the issue, and allow the Old Act cases to be terminated under the Old Act, as Congress intended.

Finally, the petition should be granted because of the potential for a conflict among the Circuits. As more fully discussed in "IV" below, there is presently pending in the Fifth Circuit an appeal on the issue presented in this petition.

I. *The Second Circuit's Decision Violates the Plain Meaning of §403(a).*

In enacting §403(a) of the New Code, Congress established a clear and simple rule on the effect that the New Code would have on cases commenced under the Old Act. Instead of merely stating

that the New Act would not affect Old Act cases, Congress provided that Old Act cases would be determined, and the substantive rights of the parties to the Old Act cases governed by the Old Act, as if the New Code had not been enacted.

The rule of §403(a) must be compared to the savings clause enacted by Congress when the Chandler Act Amendments to the Old Act became effective in 1938. The savings clause contained in §6(b) of the Chandler Act, §6(b), 52 Stat. 840 states that the Chandler Act Amendments were to apply "so far as practicable in cases pending when it takes effect." Thus, the Bankruptcy Court was given discretion under the Chandler Act to apply the new statute to pending cases. Section 403(a), on the other hand, precludes the bankruptcy judge from exercising any discretion as to whether to apply the New Code to Old Act proceedings, and separates, in all respects, Old Act and New Code cases.

In his decision reversing the Bankruptcy Judge, District Judge Elfvin recognized that the plain meaning of §403(a) precluded application of the New Code to cases commenced under the Old Act:

> Had Congress intended that a bankruptcy judge be given discretion in determining what law should be applied to cases commenced under the Old Act, it could have done so. *Compare*, former 11 U.S.C. §676(c). Instead, Congress established a clear and simple rule — to wit, apply the Old Act to cases commenced under the Old Act. *In re Geiger Enterprises, Inc.*, 1 CBC 2d 1004, 1006-1007 (W.D.N.Y. 1980) (Appendix, A-16 at A-20).

Where a statute, on its face, unambiguously sets forth its plain meaning, the court's sole function is to enforce it according to its terms. No duty of interpretation arises. *T.V.A. v. Hill*, 437 U.S. 153, 173 (1978); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The Second Circuit's decision, holding that the "dismissal-refiling" is permissible unless the creditors can show prejudice to their substantive rights, violates the statute's plain meaning.

The sole exceptions to the rule of §403(a) are set forth in §403(b), which apply certain provisions of the New Code to pending Old Act railroad reorganization cases where the trustee has not yet filed a plan of reorganization. Those exceptions are not applicable here.

District Judge Elfvin relied on the plain meaning of §403(a) in his decision in this case, *In re Geiger Enterprises, Inc.*, 1 CBC 2d 1004, 1006 (W.D.N.Y. 1980) (Appendix, A-16), as did Bankruptcy Judge Joel Lewittes, in his decision in *In re Lincoln Plaza Towers Assoc.*, 3 CBC2d 153 (Bankr. Ct. S.D.N.Y. 1980) in which a debtor, whose Old Act Chapter XII case had been dismissed, attempted to file a Chapter 11 petition under the Code. The Chapter 11 was dismissed by the bankruptcy court, on the basis of the plain meaning of §403(a). See also, *In re Macon Uplands Venture*, Nos. 79-200-MAC; 80-151-MAC (M.D. Ga.), *appeal filed*, (5th Cir. Dec. 12, 1980) (Appendix, A-32); *In re Blue*, 2 CBC 2d 404 (Bankr. Ct. D.Md. 1980); *In re Eagson Corp.*, 1 CBC 2d 309 (Bankr. Ct. E.D. Pa. 1980).

Under the Second Circuit's decision, an Old Act case can be indirectly converted to a New Code case in one of three circumstances. If the debtor and interested creditors consent, or if no creditor objects, or if the objecting creditors are unable to show material prejudice, then the conversion will be accomplished by the "dismissal-refiling." These three alternatives violate §403(a) and should not be countenanced by this Court. Had Congress intended such possibilities, it would not have drafted §403(a) as it did.

II. *The Second Circuit's Decision Violates the Legislative History of §403(a).*

Where a statute is plain and unambiguous on its face, resort to legislative history is generally not permitted. *T.V.A. v. Hill*, 437 U.S. 153, 184 n. 29 (1978). An examination of the legislative history, however, only reinforces the plain meaning of §403(a).

> Title IV of H.R. 8200 contains provisions to govern the orderly transition from the current bankruptcy law and bankruptcy administrative system to the one proposed by the bill . . .
>
> The first phase of transition begins on October 1, 1978, the primary effective date of the bill.[1] On that date, the new substantive law of bankruptcy as proposed by the bill will be put into effect. It will apply to all cases commenced on or after October 1, 1978. The application of the new law will only be to new cases, however. Cases commenced before October 1, 1978, will continue to be governed by the Bankruptcy Act, as in effect on September 30, 1978, and by all other applicable laws in effect on that date. Those cases will proceed as though this bill had not been enacted. . . . H.R. REP. No. 95-595, 95th Cong., 1st Sess., 287-88 (1977) (citations omitted).
>
> The new law will not affect cases commenced under the old law. Those cases will proceed as though this Act did not take effect. The section [403(a)] applies to substantive as well as procedural matters, to matters governed by Federal bankruptcy law as well as matters governed by State law. . . . H.R. REP. No. 595, 95th Cong., 1st Sess., 459 (1977) (citations omitted).

In referring to §403(a), the Second Circuit stated in a decision prior to its decision in this case that, "However, we consider it [§403(a)] persuasive evidence of Congress' desire not to impair the rights of parties to actions commenced under the old Bankruptcy Act." *In re Adamo et al*, 619 F.2d 216, 221 (2d Cir.), *cert. denied*, 101 S.Ct. 125 (1980). The Second Circuit's decision in this case cannot be reconciled with the legislative history of §403(a).

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[1]The New Code was not enacted until November 6, 1978, and the effective date was ultimately set at October 1, 1979, by Pub. L. 95-598, Title IV, §402(a).

III. *Bankruptcy Rule 11-42(a) Should Not Be Interpreted to Allow Circumvention of §403(a).*

The Second Circuit's holding is based upon an erroneous interpretation of Bankruptcy Rule 11-42(a) which, if sustained, allows Old Act debtors to obtain the benefits of the New Code by merely dismissing the Old Act case and immediately filing a case under the New Code. This Court should not sanction the use of a procedural device which will render §403(a) a nullity. The dismissal of an Old Act case, followed by an immediate filing under the New Code, cannot be distinguished in substance from an impermissible conversion. Geiger should not be allowed to accomplish by indirection what it clearly cannot do directly.

Although the power of a Bankruptcy Court to dismiss an Old Act Chapter XI case pursuant to Bankruptcy Rule 11-42(a)(2) cannot be denied, the rule was improperly used in this case to circumvent §403(a). The Chapter XI debtor has no absolute right to a dismissal of its case. Bankruptcy Rule 11-42(a)(2) provides that upon the debtor's application to dismiss, the Court shall, after hearing, either dismiss the Chapter XI or adjudicate the debtor a bankrupt, whichever is in the best interests of the debtor and creditors. *Banque de Financement v. First Nat. Bank of Boston*, 568 F.2d 911, 921-22 (2d Cir. 1977). If the court orders a dismissal, the debtor is revested with title to its property (Bankruptcy Rule 11-42(d)) and the creditors are free to pursue their rights against the former debtor and its property, since it is no longer protected by the automatic stay provision against lien enforcement provided by Bankruptcy Rule 11-44(a).

> It should be apparent that, upon dismissal, the debtor is placed exactly where he was before the Chapter XI case was filed and it is therefore unnecessary in the statute to provide for something so plain . . . . The second sentence of Rule 11-42(d) merely makes plain not only that the debtor is revested with title to its property but, also, that a certified copy of the order of dismissal shall constitute

> conclusive evidence of that revestment. This, in effect, preserves to the creditors who have been informed of the dismissal under Rule 11-42(c), their remedies against the debtor's property. 14 COLLIER ON BANKRUPTCY §11-42.07 (14th Ed. 1980)

Thus, upon a debtor's motion to dismiss its Old Act Chapter XI proceeding under Bankruptcy Rule 11-42(a)(2), the bankruptcy court has two alternatives. First, it must determine whether it will be in the best interest of the debtor and creditors to have an orderly liquidation, in which case the debtor will be adjudicated a bankrupt. Alternatively, the proceeding may be dismissed outright, in which case the debtor will be revested with title to his property, and the creditors free to take legal action to sue the debtor and realize upon their collateral.

In this case, Geiger was not revested with title to its property, upon the dismissal of the Chapter XI. The sole reason the motion to dismiss was made was to allow it to refile a petition under the New Code, as indicated in the Bankruptcy Judge's Notice to Creditors (Appendix, A-28). At no time was Geiger or its property free from the protection of the Bankruptcy Court. From August 15, 1979 (the date Geiger's Chapter XI petition was filed) to February 8, 1980, Geiger's creditors were stayed from taking action against it and its property by the automatic stay provisions of Bankruptcy Rule 11-44(a). As planned, the New Code petition (Appendix, A-30) was filed simultaneously with the Order dismissing the Chapter XI (Appendix, A-12). Immediately upon such filing, Geiger's creditors continued to be prevented from enforcing their rights in its property, by virtue of §362 of the New Code, 11 U.S.C. §362. Bankruptcy Rule 11-42(a) should not be used to allow circumvention of §403(a).

IV. *The Potential for a Conflict Among the Circuits Exists as a Result of a Pending Appeal in the Fifth Circuit.*

There is presently pending on appeal in the Fifth Circuit, a case involving the question presented by this Petition; *In re Macon Uplands Venture*, (M.D. Ga.), *appeal filed*, (5th Cir. Dec.

12, 1980) (Appendix, A-32) involved a debtor whose Old Act Chapter XII petition was dismissed. As a result of the dismissal, secured creditor Metropolitan Life Insurance Company proceeded to foreclose its lien on Macon Venture's real estate. The foreclosure sale was scheduled for December 2, 1980.

On December 1, 1980, less than twenty-four hours before the sale, Macon Venture filed a petition under Chapter 11 of the New Code, in order to stay the pending sale. Relying on §403(a), District Judge Owens held on December 2, 1980, that Macon Venture was precluded from refiling a petition under the New Code, and therefore dismissed the New Code filing.

> To this debtor it is as if the Bankruptcy Reform Act of 1978 "had not been enacted." That being the situation, debtor's purported filing of a "Voluntary Petition Under Chapter 11" of the Bankruptcy Reform Act of 1978 is a nullity and is hereby dismissed in its entirety. (Appendix, A-32 at A-36).

Macon Venture filed a Notice of Appeal to the Fifth Circuit on December 12, 1980, which appeal has not yet been argued. A definite ruling by this Court on the meaning of §403(a) will avoid the possibility of a conflict between the Second and Fifth Circuits, and provide nationwide uniformity.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Gary F. Amendola, *of Counsel*

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

For The Second Circuit

Nos. 27-9 and 214-6 — September Term, 1980

(Argued September 23, 1980 Decided October 29, 1980)

Docket Nos. 80-5015, 80-5019 and 80-5029-31

In re: GEIGER ENTERPRISES, INC.,

Debtor-in-Possession.

OFFICIAL CREDITORS' COMMITTEE OF GEIGER ENTERPRISES, INC., GEIGER ENTERPRISES, INC., Debtor-in-Possession, and AMOCO OIL COMPANY, Creditor,

Appellants,

v.

CENTRAL TRUST COMPANY ROCHESTER N.Y., Creditor, and THE UNITED STATES OF AMERICA,

Appellees.

Before:

MOORE, MULLIGAN and KEARSE,

Circuit Judges.

Appeal from an order of the United States District Court, Western District of New York, Hon. John T. Elfvin, reversing an order of the Bankruptcy Court, Hon. Beryl E. McGuire, which granted motion of debtor to dismiss petition filed under former

Bankruptcy Act to permit refiling under Bankruptcy Reform Act of 1978.

Reversed and remanded.

DONALD P. SHELDON, Buffalo, N.Y., of counsel, *for Appellant Creditors' Committee.*

DANIEL EVANS BRICK, North Tonawanda, N.Y. (Brick, Brick & Elmer, North Tonawanda, N.Y., Thomas R. Elmer, of counsel) *for Appellant Geiger Enterprises, Inc.*

ROBERT M. SPAULDING, Buffalo, N.Y. (Phillips, Lytle, Hitchcock, Blaine & Huber, Buffalo, N.Y., Paul B. Zuydhoek, William J. Brown, of counsel) *for Appellant Amoco Oil Company.*

GARY F. AMENDOLA, Rochester, N.Y. (Woods, Oviatt, Gilman, Sturman & Clarke, Rochester, N.Y., of counsel) *for Appellee Central Trust.*

JO-ANN HORN, Washington, D.C. (Dept. of Justice, Washington, D.C., M. Carr Ferguson, Asst. Atty. General, Gilbert E. Andrews, Richard J. Arcara, U.S. Atty., Buffalo, N.Y., of counsel) *for Appellee USA.*

MULLIGAN, *Circuit Judge:*

This is an appeal by Geiger Enterprises (Geiger), the Official Creditors Committee of Geiger Enterprises, Inc. (Committee) and Amoco Oil Company (Amoco) from a judgment of March 5, 1980 rendered by Hon. John T. Elfvin, United States District Court for the Western District of New York, which reversed an order of Bankruptcy Judge Beryl E. McGuire, issued on February 8, 1980. The District Court certified that the appeal involved a

controlling question of law and may materially advance the termination of the litigation. This court by order dated July 21, 1980 granted permission to appeal under 28 U.S.C. §1292(b). The appeal presents an issue of first impression in this court involving the application of the provisions of the new bankruptcy code to petitions filed and dismissed under the old law.

I.

The debtor Geiger filed a petition under Chapter XI of the Bankruptcy Act (formerly 11 U.S.C. §701, *et seq.*) (old Act) on August 15, 1979. Thereafter on October 29, 1979, Oilatomic, Inc., and on December 17, 1979, Willie the Whale, Inc. and River Road Oil Co., all alleged to be wholly owned subsidiaries of Geiger, filed petitions under Chapter 11 of the Bankruptcy Reform Act of 1978, Pub.L. 95-598, 92 Stat. 2549, which had become effective on October 1, 1979 (new Code). On February 8, 1980, four additional Geiger affiliated corporations (Auto Stop Gas, Inc., Queen City Filling and Manufacturing, Inc., Hardrock Paving Co., Inc. and Budget Gas, Inc.) all filed petitions under Chapter 11 of the new Code.

On January 9, 1980 the debtor Geiger applied to Bankruptcy Judge McGuire to have its petition filed under Chapter XI of the old Act dismissed. In its application Geiger represented that it intended to file a petition under Chapter 11 of the new Code and would make further application for a substantive consolidation of the proceedings of Geiger and its wholly owned subsidiaries and affiliates including those who had not yet filed Chapter 11 proceedings.

At a hearing before the Bankruptcy Judge on February 4, 1980, the United States of America, a priority creditor, and Central Trust Co., Rochester New York (Central), a secured

creditor, appeared in opposition. By memorandum and order dated February 8, 1980, the Bankruptcy Judge granted the petition. Noting the "probable necessity for substantive consolidation," he found that under Rule of Bankruptcy Procedure 11-42, a "dismissal to permit refiling" was in the best interest of the estate.[1]

Judge Elfvin, by memorandum and order entered on March 3, 1980, reversed the order of the Bankruptcy Judge. The District Court's reversal was based on section 403(a) of the new Code which provides:

> "(a) A case commenced under [the old Act], and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if [the new Code] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if [the new Code] had not been enacted."

Pub.L. 95-598, Title IV, 92 Stat. 2683, codified at 11 U.S.C. prec. §101 (1979).

The District Court held that the plain meaning of this section is that the Bankruptcy Court must apply the old Act to cases filed prior to October 1, 1979 and that such cases shall proceed as if the new Code had never been enacted. The court further found that a dismissal and refiling would permit the Bankruptcy Court to apply the new Code to a petition filed under the old Act, which would "constitute an impermissible circumvention of section

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[1]The Rules of Bankruptcy Procedure applicable to the old Act, including Rule 11-42, insofar as they are consistent with the new Code, remain in effect until they "are repealed or superseded" by new rules. Pub.L. 95-598, Title VI, §405(d); see 11 U.S.C. Pamphlet, Interim Bankruptcy Rules, Preliminary Note of Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States at 2 (1970).

403(a)." While admitting that its holding would render a "desirable" consolidation impossible in this case, the court found the result to be mandated by the statute.[2]

The appellants now argue that there has been no violation of section 403(a) because Rule of Bankruptcy Procedure 11-42(a)[3] permits a voluntary dismissal of a petition under Chapter XI. Although Rule 11-42(a) was the authority relied upon by the Bankruptcy Judge in granting the dismissal, this point was not addressed in the District Court's memorandum and order. Appellants urge that in exercising his discretion in dismissing the petition the Bankruptcy Judge found that a refiling and substantive consolidation under Chapter 11 of the new Code

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[2]We note that when the Chandler Act of 1938 amended the old Act, see 52 Stat. 840, Sec. 6(b), former U.S.C. §1 note, the "savings" clause of section 6(b) provided that the provisions of the amendatory act would govern proceedings "so far as practicable in cases pending when it takes effect." Thus, as the United States argues, while the Chandler Act vested discretion in the Bankruptcy Court to determine whether provisions of the Act should apply to pending cases, no such discretion is provided for in section 403(a). The only exception is set forth in section 403(b) which allows any pending railroad reorganization case where no plan of reorganization had yet been filed by the trustee to be governed by the new Code. That section is of course not applicable here.

[3]Rule of Bankruptcy Procedure 11-42(a) provides in pertinent part:

> (a) *Voluntary Dismissal or Conversion to Bankruptcy.*
>
> The debtor may file an application or motion to dismiss the case or to convert it to bankruptcy at any time prior to confirmation or, where the court has retained jurisdiction, after confirmation. On the filing of such application or motion, the court shall—
>
> . . . . .
>
> (2) if the petition was filed pursuant to Rule 11-6, enter an order adjudicating the debtor a bankrupt if he so requests, or, if he requests dismissal, enter an order after hearing on notice dismissing the case or adjudicating him a bankrupt whichever may be in the best interest of the estate.

would achieve "[p]ractical, economical and expeditious administration and the avoidance of unnecessary and costly litigation" and accordingly was in the best interest of the estate. The Government, on the other hand, argues that this court should not countenance such "procedural chicanery," and that the best interest of the estate is not served by permitting a refiling and consolidation under the new Code since it would jeopardize the tax priority interests of the Government, as well as those of Central, a major secured creditor.

II.

We cannot agree with the Government that a "conditional" dismissal of the Chapter XI petition is precluded by Rule 11-42(a). The Rule specifically authorizes the Bankruptcy Court after hearing on notice either to adjudicate the petitioner as a bankrupt or to dismiss, whichever "may be in the best interest of the estate." Both sides seem to agree and the law is clear that the best interests of the estate must be interpreted to mean those of the creditors as well as the debtor. *Banque de Financement v. First Nat. Bank of Boston*, 568 F.2d 911, 921-22 (2d Cir. 1977). The failure of Rule 11-42 expressly to provide for dismissal to permit refiling does not in our view preclude such a disposition in all cases. The operative test is whether the estate's best interest will be served by the determination.

However, the analysis cannot end at this point. Section 403(a) expressly provides that the "substantive rights of parties ... shall continue to be governed by the law applicable to such case, matter or proceeding as if the [new Code] had not been enacted." The substantive rights of the creditors as against the bankrupt are fixed as of the filing of the petition in bankruptcy. *United States v. Marxen*, 307 U.S. 200, 207 (1939). Unquestionably consolidation is "a measure vitally affecting substantive rights."

In re Flora Mir Candy Corp., 432 F.2d 1060, 1062 (2d Cir. 1970). Nor is there any question that a Chapter 11 proceeding under the new Code would create possible substantive advantages for the debtor at the expense of the United States and Central.

The United States has a tax claim in excess of $2 million against Geiger. Chapter XI of the old Act provides that a priority creditor can insist upon a deposit in full of the amount due to it prior to the confirmation of any plan of arrangement unless a waiver is given. §337(2), former 11 U.S.C. §737(2); §361, former 11 U.S.C. §761. However, under the new Code the United States is only entitled to deferred cash payments. 11 U.S.C. §1129(a)(9)(C). Moreover, under the old Act taxes due and owing within three years before bankruptcy are nondischargeable and are given a fourth priority. §17(a)(1), former 11 U.S.C. §35(a)(1); §64a, former 11 U.S.C. §104a. Under the new Code these tax claims are moved down to the sixth priority, although they remain non-dischargeable. 11 U.S.C. §507(a), §523(a)(1). There are other substantive changes with respect to federal tax liens. See, e.g., 11 U.S.C. §724(b), §545(2).

In addition, under the new Code the general preferential transfer period has been reduced from four months to ninety days. 11 U.S.C. §547(b). Central also argues that the new Code allows the Bankruptcy Court to confirm a plan of arrangement over the objection of a secured creditor whose claim is impaired by the plan so long as it receives property of a value equal to the allowed amount of the secured claim. See 11 U.S.C. §1129(a) & (b). There was no such provision under Chapter XI of the old Act.

The appellants do not contest that the new Code contains substantive changes which could disadvantage the United States and Central. They argue, however, that the record does not support a finding that such prejudice is any more than

hypothetical. We agree. Neither the Bankruptcy Judge nor the District Court considered this issue. We conclude that Rule 11-42(a) must be read in conjunction with section 403(a). If substantive rights of the United States or Central are in fact materially prejudiced then dismissal of Geiger's Chapter XI petition is not warranted. Assuming that such is not the case, then the Bankruptcy Court must determine whether or not consolidation is appropriate.[4]

We therefore reverse and remand for further hearings in conformity with this opinion.

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[4]Despite his reference to the "probable necessity" of consolidation, the Bankruptcy Judge made no formal determination to consolidate. This court has cautioned that the "power to consolidate should be used sparingly because of the possibility of unfair treatment of creditors of a corporate debtor who have dealt solely with that debtor without knowledge of its interrelationship with others." *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966). Consolidation is nevertheless warranted "where the interrelationships of the group [of debtors] are hopelessly obscured and the time and expense necessary even to attempt to unscramble them so substantial as to threaten the realization of any net assets for all the creditors." *Id.*; see *In re Flora Mir Candy Corp.*, *supra*, 432 F.2d at 1063.

Memorandum of the United States District Court, Western District of New York, Bankruptcy Court, Entered February 8, 1980

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN RE

GEIGER ENTERPRISES, INC.

Debtor

B-79-2383 M

Brick, Brick & Elmer, P.C. (Daniel E. Brick, Esq., of counsel), North Tonawanda, New York, Attorneys for Debtor.

Donald P. Sheldon, Esq., Buffalo, New York, Attorney for Creditors' Committee.

Phillips, Lytle, Hitchcock, Blaine & Huber (Robert M. Spaulding, Esq., of counsel), Buffalo, New York, Attorneys for Amoco Oil Company.

Jaeckle, Fleischmann & Mugel (Eugene J. Smolka, Esq., of counsel), Buffalo, New York, Attorneys for Ashland Oil Company.

Woods, Oviatt, Gilman, Sturman & Clarke (Gary F. Amendola, Esq., of counsel), Rochester, New York, Attorneys for Central Trust Company Rochester N.Y.

Angeline Hall, Esq., Washington, D.C., Attorney for United States Department of Justice.

LeBlanc & Panara (Norman A. LeBlanc, Jr., Esq., of counsel), Hamburg, New York, Attorneys for Donald Mammoser.

Memorandum of the United States District Court, Western District of New York, Bankruptcy Court, Entered February 8, 1980

MEMORANDUM

McGuire, USBJ

The debtor, Geiger Enterprises, Inc., has filed a motion to dismiss its pending Chapter XI case. The motion is supported by the Official Creditors' Committee and Amoco Oil Company, but opposed by Central Trust Company Rochester N.Y. and the Government. A hearing on the motion was scheduled for January 30 and continued to February 4, 1980.

The debtor filed its Chapter XI case under the former Bankruptcy Act on August 15, 1979. The filing of the following affiliated or subsidiary corporations and principals under Chapter 11 of the new Code followed:

Oilatomic Corp., B-79-14129 M (filed 10-29-79)

Willie the Whale, Inc., B-79-14428 (filed 12-17-79)

River Road Oil Co., Inc., B-79-14427 (filed 12-17-79)

Harold & Patricia Geiger, B-80-10143 M (filed 1-23-80).

The debtor has offered evidence of the probable necessity for substantive consolidation of the above cases and three (3) others because of the condition of the debtor's financial affairs. Indeed, the Government concedes the probability of the need for substantive consolidation.

In the Court's view, substantive consolidation of the subsidiaries, affiliates and/or principals filed under the new Bankruptcy Code with Geiger Enterprises, Inc., if it remains in the former Chapter XI, clearly is impossible. Even a cursory review of the differing substantive provisions[1] and distribution

[1]For example, compare §541, 11 U.S.C. with the former §110, 11 U.S.C.; compare §502, 11 U.S.C. and the Comment to §101(9), 11 U.S.C. with the former §103, 11 U.S.C.; compare §§544 through 549, 11 U.S.C. with the former §§96, 107 and 110, 11 U.S.C.

rules[2] renders this conclusion inescapable.

The motion is governed by the provisions of 11-42 of the Rules of Bankruptcy Procedure. It is unique in that the purpose of dismissal is to permit refiling under compatible substantive law provisions and distribution rules and, thus, permit substantive consolidation. In opposing the motion, the parties have argued that Congress did not intend to permit this result. To the contrary, there is no reason to believe that the Congress even envisioned a problem such as that at hand.

Practical, economical and expeditious administration and the avoidance of unnecessary and costly litigation by the alternative approach suggested by the Government render dismissal to permit refiling to be in the best interest of this estate.

Dated: February 8, 1980

/s/ BERYL E. McGUIRE
U.S.B.J.

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[2]For example, compare §507, 11 U.S.C. with the former §104, 11 U.S.C.

Order of the United States District Court, Western District of New York, Bankruptcy Court, Dismissing Geiger's Chapter XI, Entered February 8, 1980

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
BANKRUPTCY COURT

In Re:

GEIGER ENTERPRISES, INC.

Debtor

Bankruptcy No. 79-02383M

The motion of GEIGER ENTERPRISES, INC. the debtor in possession, to dismiss the within Chapter XI case, having been heard on the 4th day of February, 1980 and due notice of said hearing having been given by mail to the creditors of said debtor, the creditors' committee elected under Section 338 of said Act, and the creditors of OILATOMIC, INC., WILLIE THE WHALE, INC., RIVER ROAD OIL, CO., INC. and after hearing the sworn testimony of CEASAR A. COSCI, C.P.A., accountant for GEIGER ENTERPRISES, INC. and BRICK, BRICK, BRICK AND ELMER, P.C., attorneys for said debtor, DANIEL EVANS BRICK, ESQ., of counsel and PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, attorneys for Amoco Oil, Inc., ROBERT M. SPAULDING, ESQ., of counsel and DONALD P. SHELDON, ESQ., attorney for the creditors' committee, in support of the motion, and the U.S. DEPARTMENT OF JUSTICE, TAX DIVISION, for the United States, ANGELYN C. HALL, of counsel, and WOODS, OVIATT, GILMAN, STURMAN & CLARKE, attorneys for creditor, CENTRAL TRUST COMPANY of Rochester, New York, GARY F. AMENDOLA, of Counsel, in opposition to the motion; and

Order of the United States District Court,
Western District of New York, Bankruptcy Court,
Dismissing Geiger's Chapter XI,
Entered February 8, 1980

It appearing that the debtor, GEIGER ENTERPRISES, INC. will re-file a petition under Chapter 11 of the Bankruptcy Code, and grant to the creditors a blanket security interest in any and all personal property, to cover accrued administration expenses under the Chapter XI proceeding, and it is in the best interest of the creditors of the debtor to dismiss the within Chapter XI case;

Now upon said motion and all the proceedings had before me at the hearing, and due deliberation having been had thereon, it is

ORDERED, that the Chapter XI case commenced by the filing herein on the 15th day of August, 1979, of the debtor's original petition proposing an arrangement under Chapter XI of the Act be and is hereby dismissed, and it is further

ORDERED, that the dismissal of the debtor's Chapter XI petition is contingent upon a blanket security interest in any and all personal property on post petition indebtedness being given to the creditors' committee as agent for all unsecured creditors, and it is further

ORDERED, that there shall be no stay of any further proceedings in this Court pending appeal of this order.

Dated: February 8, 1980.

/s/ BERYL E. McGUIRE
Beryl E. McGuire
(Bankruptcy Judge)

**Order of the United States District Court,
Western District of New York,
Granting Stay Pending Appeal,
Entered February 11, 1980**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re GEIGER ENTERPRISES, INC.,

Debtor In Possession

CIV-80-134

Central Trust Company Rochetser, N.Y. ("Central") and the United States, creditors in a bankruptcy proceeding initiated by a petition filed August 15, 1979 by Geiger Enterprises, Inc. under Chapter XI of the Bankruptcy Act, having appealed from an Order by Bankruptcy Judge Beryl E. McGuire dated February 8, 1980 granting the motion of said petitioner to dismiss the said petition, and the United States and Central having moved for a stay of the effectiveness and any implementation of said Order pending the hearing and determination of said appeals, and the United States having appeared before me February 8, 1980 by Angelynn C. Hall, Esq. of the United States Department of Justice and argued in support of said motion for such stay, and Central having then and there appeared by Woods, Oviatt, Gilman, Sturman and Clarke (Gary F. Amendola, Esq., of counsel) and also argued in support of said motion, and said petitioner having then and there appeared by Daniel Evans Brick, Esq. and argued in opposition to said motion, and the creditors' committee in the proceeding initiated by said petition having then and there appeared by Donald P. Sheldon, Esq. and also argued in opposition to said motion, and creditor Amoco Oil Company having then and there appeared by Phillips, Lytle, Hitchcock, Blaine & Huber (Robert M. Spaulding, Esq., of counsel) and also argued in opposition to said motion,

Order of the United States District Court,
Western District of New York,
Granting Stay Pending Appeal,
Entered February 11, 1980

NOW, THEREFORE, upon all of the above and upon due deliberation it is hereby

ORDERED that said motion is granted and the effectiveness and implementation of the said Order of the Hon. Beryl E. McGuire are stayed pending the hearing and the determination of said appeal; and it is hereby further

ORDERED that the merits of said appeal shall come on to be heard before me in Part II of this court at 4:00 p.m. on the 15th day of February, 1980.

Dated: Buffalo, N.Y.
February 9, 1980

/s/ JOHN T. ELFVIN
U.S.D.J.

Memorandum and Order of the United States District Court, Western District of New York, Reversing Bankruptcy Court Decision, Entered March 3, 1980

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re GEIGER ENTERPRISES, INC.,

Debtor in Possession

CIV-80-134

Central Trust Company of Rochester, N.Y. ("Central Trust") and the United States of America ("the government") appeal from an order of the Honorable Beryl E. McGuire, United States Bankruptcy Judge, entered February 8, 1980. The order dismissed a then pending bankruptcy proceeding commenced by Geiger Enterprises, Inc. ("Geiger").

The factual background is not in dispute.

On August 15, 1979 Geiger filed a petition for relief under Chapter XI (formerly 11 U.S.C. §701 *et seq.*) of the Bankruptcy Act of 1898 ("the Old Act"). After the October 1, 1979 effective date of the Bankruptcy Reform Act of 1978 ("the New Act"), seven corporations, which are affiliates or subsidiaries of Geiger, and Harold and Patricia Geiger filed petitions for relief under Chapter 11 of the New Act. At some point, various of the parties determined that a substantive consolidation of the petitions was desirable but found that such was impracticable because Geiger's petition was subject to Chapter XI of the Old Act ("Old Chapter XI"), whereas the other petitions were subject to Chapter 11 of the New Act ("New Chapter 11"). To alleviate this obstacle, Geiger moved to dismiss its petition under Old Chapter XI with the representation that it would immediately refile a petition under New Chapter 11.

Memorandum and Order of the United States District Court, Western District of New York, Reversing Bankruptcy Court Decision, Entered March 3, 1980

Following hearings on January 30, 1980 and February 4, 1980, Judge McGuire, in an order entered February 8, 1980, granted Geiger's motion to dismiss. In an accompanying Memorandum, Judge McGuire stated in part:

> "The debtor has offered evidence of the probable necessity for substantive consolidation of the above cases and three (3) others because of the condition of the debtor's financial affairs. Indeed, the Government concedes the probability of the need for substantive consolidation.
>
> "In the Court's view, substantive consolidation of the subsidiaries, affiliates and/or principals filed under the new Bankruptcy Code with Geiger Enterprises, Inc., if it remains in the former Chapter XI, clearly is impossible. Even a cursory review of the differing substantive provisions and distribution rules renders this conclusion inescapable.
>
> "The motion is governed by the provisions of 11-42 of the Rules of Bankruptcy Procedure. It is unique in that the purpose of dismissal is to permit refiling under compatible substantive law provisions and distribution rules and, thus, permit substantive consolidation. In opposing the motion, the parties have argued that Congress did not intend to permit this result. To the contrary, there is no reason to believe that the Congress even envisioned a problem such as that at hand.
>
> "Practical, economical and expeditious administration and the avoidance of unnecessary and costly litigation by the alternative approach suggested by the Government [piercing the corporate veil of the affiliate and subsidiary corporations and bringing them under Old Chapter XI] render dismissal to permit refiling to be in the best interest of this estate."

Memorandum and Order of the United States District Court, Western District of New York, Reversing Bankruptcy Court Decision, Entered March 3, 1980

Immediately after the entry of the February 8, 1980 order, Geiger filed a petition for relief under New Chapter 11. Thereafter, several additional corporations, which are also affiliates or subsidiaries of Geiger, filed petitions for relief under New Chapter 11.

Central Trust, a secured creditor of Geiger, and the government, possessor of a lien against Geiger for unpaid taxes, appealed the February 8, 1980 order under Bankruptcy Rule 801 and thereafter moved to stay said order pending appeal under Bankruptcy Rule 805. The motion for a stay was argued February 8, 1980 and, in an Order entered February 11, 1980, I granted the stay and further ordered that the parties appear before me February 15, 1980 to argue the merits of the appeal. The appeal was argued on said day and the matter was taken under advisement.

It is agreed that the instant appeal turns upon the proper construction of section 403(a) of the New Act (11 U.S.C. prec. §101) which provides:

> "(a) A case commenced under [the Old Act], and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if [the New Act] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if [the New Act] had not been enacted."

Central Trust and the government argue that the February 8, 1980 dismissal of an Old Chapter XI proceeding upon the representation that the debtor would immediately refile under New Chapter 11 violates section 403(a) in that the bankruptcy court will apply the New Act to a case commenced under the Old

Act and the substantive rights of the parties thereto will be governed by the New Act, rather than by the Old Act. Appellants primarily rely upon the plain meaning of section 403(a) and its legislative history. Appellees assert that Congress did not envision the situation where, as here, petitions were filed by debtors before and after October 1, 1979 and a substantive consolidation of said petitions is in the best interest of the debtors and creditors. They urge that I fill such alleged gap in section 403(a) by creating a narrow exception permitting a debtor to voluntarily dismiss its Old Chapter XI petition in order to refile its petition under New Chapter 11.

Under the so-called plain meaning rule, "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, * * * the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). *See*, 2A Sutherland on Statutory Construction 48 (4th Ed. 1973). In the instant case, the plain meaning of section 403(a) is that the bankruptcy court must apply the Old Act to cases filed prior to October 1, 1979 and that such cases shall proceed as if the New Act had never been enacted.

When confronted with a statute which is plain and unambiguous on its face, courts ordinarily do not look to legislative history as a guide to its meaning. *See, Tennesee Valley Authority* v. *Hill*, 437 U.S. 153, 184 n. 29 (1978); 2A Sutherland on Statutory Construction, *supra*, at 186-87. However, the legislative history of section 403(a) merely confirms the above plain meaning of said section. H.R. Rep. No. 595, 95th Cong. 2d Sess. 287-88, 459, *reprinted in* [1978] U.S. Code Cong. & Ad. News, 5963, 6244, 6414-15. *See*, S. Rep. No. 989, 95th Cong. 2d Sess. 20, 166-67, *reprinted in* [1978] U.S. Code Cong. & Ad. News

5787, 5806, 5952-53; 1 Collier On Bankruptcy ¶7.03[1] (15th ed. 1979).

Given the plain meaning of section 403(a) and its legislative history, I find that Judge McGuire erred in permitting Geiger to voluntarily dismiss its Old Chapter XI petition in order to refile under New Chapter 11. Such dismissal and refiling would permit the bankruptcy court to apply the New Act to a petition filed under the Old Act and therefore said actions constitute an impermissible circumvention of section 403(a).

Additionally, I am unpersuaded by appellees' argument that a narrow judicial exception should be created because Congress did not consider the situation presented by this case. Had Congress intended that a bankruptcy judge be given discretion in determining what law should be applied to cases commenced under the Old Act, it could have done so. *Compare*, former 11 U.S.C. §676(c). Instead, Congress established a clear and simple rule — to wit, apply the Old Act to cases commenced under the Old Act. While such rule may render a desirable substantive consolidation difficult or impossible in this case, the bankruptcy court must apply the provisions of Old Chapter XI to Geiger's petition for relief inasmuch as such action was filed prior to October 1, 1979 under the Old Act.

It is therefore hereby

ORDERED that the February 8, 1980 order of the Honorable Beryl E. McGuire, United States Bankruptcy Judge, is reversed.

Dated: Buffalo, N.Y.
February 29, 1980

/s/ JOHN T. ELFVIN
U.S.D.J.

**Order of the United States District Court,
Western District of New York,
Modifying Prior Memorandum,
Entered March 12, 1980**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re GEIGER ENTERPRISES, INC.,

Debtor in Possession

CIV-80-134

My Memorandum and Order entered March 3, 1980 is hereby ORDERED amended to add the following at the end thereof:

"And it is further hereby

"OPINED that the instant Memorandum and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from said Memorandum and Order may materially advance the ultimate termination of the litigation pending in the United States Bankruptcy Court."

Dated: Buffalo, N.Y.
March 11, 1980

/s/ JOHN T. ELFVIN
U.S.D.J.

Order of the United States Court of Appeals for the Second Circuit, Granting Permission to Appeal, Entered July 23, 1980

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of July, one thousand nine hundred and eighty.

Present: Hon. Ellsworth A. Van Graafeiland, Circuit Judge, Hon. Jon O. Newman, Circuit Judge, Hon. Edward R. Neaher, District Judge*

In Re

GEIGER ENTERPRISES, INC.

Debtor

OFFICIAL CREDITORS COMMITTEE OF GEIGER ENTERPRISES, INC., Debtor

Petitioner

Docket No. 80-8081

ORDER

Geiger Enterprises, Inc., Amoco Oil Company, and the Official Creditors Committee of Geiger Enterprises have appealed to this Court from an order of the United States District Court for the Western District of New York reversing an order of the United States Bankruptcy Judge. The Bankruptcy Judge's order had dismissed Geiger's Chapter XI Petition filed under the old Bankruptcy Act in order to permit consolidation of Geiger's

*Hon. Edward R. Neaher, District Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Order of the United States Court of Appeals for the Second Circuit, Granting Permission to Appeal, Entered July 23, 1980

petition with petitions filed by its affiliates and individual owners under the new Act. These appeals bear Docket Numbers 80-5015, 5017, and 5019.

Because of appellants' concern that appeal as of right might not lie, they now seek permission to appeal under 28 U.S.C. §1292(b). The district judge has certified that the appeals involve a controlling question of law warranting an immediate appeal, and appropriate petitions are now before this Court.

If petitioners are entitled to appeal as a matter of right, the granting of permission under §1292(b) is unnecessary. However, if appeal is appropriate, as we find it to be in this case, the granting of unnecessary permission will not harm the appellate process and will permit expeditious disposition of the matter. Accordingly, without reaching the question whether petitioners may appeal as of right, we grant their petition for leave for appeal. The appeals will be consolidated under Docket No. 80-8081.

/s/ ELLSWORTH A. VAN GRAAFEILAND
Hon. Ellsworth A. Van Graafeiland

/s/ JON O. NEWMAN
Hon. Jon O. Newman

/s/ EDWARD R. NEAHER
Hon. Edward R. Neaher

July 21, 1980

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
Jul 23 1980
A. DANIEL FUSARO, CLERK

Judgment of the United States Court of Appeals for the Second Circuit, Sought to be Reviewed, Entered October 29, 1980

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of October one thousand nine hundred and eighty

Present: HON. LEONARD P. MOORE, HON. WILLIAM H. MULLIGAN, HON. AMALYA L. KEARSE, Circuit Judges.

GEIGER ENTERPRISES, INC.,

Plaintiff-Appellant

AMOCO OIL COMPANY

Creditor-Appellant

OFFICIAL CREDITORS COMMITTEE OF GEIGER ENTERPRISES

Appellant

v.

CENTRAL TRUST COMPANY ROCHESTER, N.Y. and UNITED STATES OF AMERICA

Defendants-Appellees

80-5015
80-5017
80-5019
80-5029
80-5031

Judgment of the United States Court of Appeals for the Second Circuit, Sought to be Reviewed, Entered October 29, 1980

Appeal from the United States District Court for the Western District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

/s/ ARTHUR HELLER
By: Arthur Heller
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
OCT 29 1980
A. DANIEL FUSARO, CLERK

Order of the United States Court of Appeals, for the Second Circuit, Denying Petition for Rehearing, Entered December 17, 1980

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of December, one thousand nine hundred and eighty.

In re: GEIGER ENTERPRISES, INC.,

Debtor-in-Possession.

OFFICIAL CREDITORS' COMMITTEE OF GEIGER ENTERPRISES, INC., GEIGER ENTERPRISES, INC., Debtor-in-Possession, and AMOCO OIL COMPANY, Creditor,

Appellants,

v.

CENTRAL TRUST COMPANY ROCHESTER N.Y. Creditor, and THE UNITED STATES OF AMERICA,

Appellees.

80-5015
80-5017
80-5019
80-5029-31

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, Central Trust Company, Rochester, New York,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

Order of the United States Court of Appeals, for the Second Circuit, Denying Petition for Rehearing, Entered December 17, 1980

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
DEC 17 1980
A. DANIEL FUSARO, CLERK

Bankruptcy Court's Notice to Creditors, Dated January 11, 1980

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

IN THE MATTER

of

GEIGER ENTERPRISES, INC.,

Debtor

D-79-02383 M

TO THE CREDITORS OF GEIGER ENTERPRISES, INC., THE ABOVE NAMED DEBTOR, AND TO THE CREDITORS OF OILATOMIC CORP., RIVER ROAD OIL CO., INC., WILLIE THE WHALE, INC. AND ALL OTHER PARTIES IN INTEREST:

NOTICE IS HEREBY GIVEN that a Meeting of Creditors of the above named Debtor, creditors of wholly owned subsidiaries of said Debtor, presently before the United States Bankruptcy Court for the Western District of New York and any other parties in interest, will be held in Room 308, Part I, Bankruptcy Court, United States Courthouse, Niagara Square, Buffalo, New York 14202, on the 30th day of January, 1980 at 11:00 a.m. to consider and act upon the following:

> AN APPLICATION of Geiger Enterprises, Inc., the Debtor herein, to have its Petition, filed under Chapter XI of the Bankruptcy Act on the 15th day of August, 1979, and the within proceeding, dismissed.

Said Application is made with the representation that if an Order is granted providing for the dismissal of the Petition and proceeding herein, said Debtor will simultaneously, with the entry of said Order, file a Petition under Chapter 11 of the

Bankruptcy Court's Notice to Creditors,
Dated January 11, 1980

Bankruptcy Code, and further, the wholly-owned subsidiaries of said Debtor will also file Petitions under said Chapter 11 of the Bankruptcy Code.

The Meeting of Creditors hereinabove scheduled may also include the transaction of such other business as may properly come before said meeting.

Dated: January 11, 1980

BERYL E. McGUIRE
U.S.D.J.
312 U.S. Courthouse
Buffalo, New York 14202

Brick, Brick & Elmer, P.C.
Daniel E. Brick, Esq. of Counsel
Attorney for Debtor
91 Tremont Street
North Tonawanda, New York 14120

Donald P. Sheldon, Esq.
Attorney for Creditors Committee
505 Bank of New York Bldg.
17 Court Street
Buffalo, New York 14202

**Petition Filed by Geiger Enterprises, Inc.
Under Chapter 11 of the Bankruptcy Code,
Filed February 8, 1980**

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re

PETITION

GEIGER ENTERPRISES, INC.

Debtor

BK. NO.
B-80-10265

1. Petitioner's post office address is 5335 River Road, Tonawanda, New York.

2. Petitioner has had its principal place of business within this district for the 180 days immediately preceding the filing of this petition.

3. Petition is qualified to file this petition in that it is qualified to be a debtor under Chapter 11 of the Bankruptcy Code as a voluntary debtor.

4. A list of debtor's creditors accompanies this petition.

WHEREFORE, petitioner prays for relief under Chapter 11 of the Bankruptcy Code.

/s/ DANIEL EVANS BRICK
Daniel Evans Brick
Attorney for Petitioner
Office and Post Office Address
91 Tremont Street
North Tonawanda, New York 14120
Telephone: (716) 693-2335

Petition Filed by Geiger Enterprises, Inc.
Under Chapter 11 of the Bankruptcy Code,
Filed February 8, 1980

STATE OF NEW YORK
COUNTY OF NIAGARA } SS.:
CITY OF NORTH TONAWANDA

I, HAROLD J. GEIGER, President of the corporation named as petitioner in the foregoing petition, do hereby swear that the statements therein contained are true according to the best of my knowledge, information and belief, and that the filing of this petition on behalf of the corporation has been duly authorized.

/s/ HAROLD J. GEIGER
Harold J. Geiger

Sworn to before me this
8th day of February, 1980.

/s/ DANIEL E. BRICK

DANIEL EVANS BRICK
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires March 30, 19____

FILED
U.S. BANKRUPTCY COURT
W.D.N.Y.
FEB 8 12:02 PM '80

Order of the United States District Court, for the Middle District of Georgia in Case of Macon Uplands Venture, Entered December 2, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

IN THE MATTER OF:

Macon Uplands Venture,
A Limited Partnership

CIVIL ACTION NOS. 79-200-MAC;
and 80-151-MAC

(Bankruptcy Nos. 78-292; 80-383
and 80-01450, Macon Division)

ORDER

On October 10, 1980, this court filed its opinion affirming the bankruptcy judge's dismissal of debtor's Chapter XII Arrangement in Bankruptcy proceeding; finding that debtor may not dismiss and/or recommence a Chapter 11 Arrangement in Bankruptcy proceeding under the more liberal provisions of the Bankruptcy Reform Act of 1978 which became effective after debtor's Chapter XII proceeding commenced; denying debtor's motion for a stay pending appeal to the Fifth Circuit Court of Appeals; and pointing out, among other things, that the effect of the opinion was to allow Metropolitan Life Insurance Company to proceed with foreclosure of the real property. Following the filing of that opinion the debtor did not move the Fifth Circuit Court of Appeals for a stay of foreclosure pending appeal, Rule 8, Federal Rules of Appellate Procedure; did not file a notice of appeal; and did not further move or communicate with this court.

Order of the United States District Court, for the Middle District of Georgia in Case of Macon Uplands Venture, Entered December 2, 1980

Georgia law requires the giving of public notice by advertisement run once each week for four weeks in the month preceding non-judicial foreclosure sale on the first Tuesday of the month. Since this court's order was filed too late in October to permit the required advertising in October to be run, Metropolitan Life in November advertised its intention to foreclose and sell debtor's real property on the first Tuesday in December — December 2, 1980 — between 10:00 a.m. and 4:00 p.m., the legal hours of sale.

At 5:05 p.m., Monday, December 1, 1980, debtor filed a one page petition entitled "Voluntary Petition Under Chapter 11" with the Bankruptcy Clerk. Local counsel in Macon for the debtor and for Metropolitan Life were then in this courthouse attending the swearing-in ceremony of Bankruptcy Judge Robert F. Hershner. Metropolitan's counsel orally asked for an immediate hearing on a motion to dismiss, and both parties were then advised the matter would be heard at 10:00 a.m. on December 2, 1980. At that time the district court was undecided as to what judge — bankruptcy or district — should hear the matter, and the parties were so advised.

Subsequently Bankruptcy Judge Hershner recalled and advised that before being sworn in on yesterday he had been of counsel for some unsecured creditors of debtor and was required to recuse himself. The parties were verbally so advised.

This judge then examined the docket sheet of Civil 79-200 and 80-151, Macon, and noted the failure of the Clerk to enter a Rule 58, Federal Rules of Civil Procedure, separate judgment.

Order of the United States District Court, for the Middle District of Georgia in Case of Macon Uplands Venture, Entered December 2, 1980

Bankruptcy Judge Algie Mosely was verbally advised of the 5:05 p.m., December 1, filing and of the previous related matters and was of the opinion that the entire matter should be dealt with by the district judge already familiar with the proceeding.

At 10:00 a.m. today the parties were heard from. Debtor's local counsel advised that debtor is of the opinion that this court's opinion of October 10, 1980, became final upon debtor's failure to appeal even though the Clerk of this court failed to enter a Rule 58 judgment and thus finally disposed of debtor's proceeding under the old bankruptcy laws. Debtor then, it is asserted, was legally authorized to commence a Chapter 11 proceeding under the Bankruptcy Reform Act of 1978. In response to the court's questions, debtor's local counsel advised that counsel did not know of any substantial change in debtor's financial circumstances since this court's October 10, 1980 opinion.

Metropolitan asserted in writing and orally that this court's opinion of October 10, 1980, held that debtor because of the savings clause of the Bankruptcy Reform Act cannot proceed under the Bankruptcy Reform of 1978 and its effort to do so by filing its alleged "Voluntary Petition Under Chapter 11" at 5:05 p.m. on the day before the advertised day of foreclosure sale, is a nullity. It urged the court to so declare and dismiss the 5:05 p.m., December 1, 1980, filed petition.

The parties further advised the court that between October 10, 1980, and December 1, 1980, Metropolitan offered upon receipt of $400,000.00 to delay foreclosure until February 1981, but that debtor or debtor's prospective purchaser had not paid said $400,000.00 and thus delayed foreclosure.

A Rule 58 judgment having never been entered following this court's October 10, 1980, opinion being filed, the appeal and all

related matters including but not limited to exclusive jurisdiction of the debtor and his property, wherever located, remains in this United States District Court and before this United States District Judge.

This court having held that debtor can proceed only under the old bankruptcy laws which permit references to referees in bankruptcy now called bankruptcy judges to be withdrawn, if that is not the posture of this proceeding, the reference of debtor's bankruptcy proceedings including its 5:05 p.m., December 1, 1980, filing, is withdrawn and all such matters are assigned to this district judge.

In addition, this United States District Court possessed of equitable powers including the power and the responsibility to enjoin the debtor from proceeding contrary to and in contravention of this court's clear unambiguous opinion of October 10, 1980, has the responsibility to prevent debtor from proceeding other than in good faith under the laws of the United States to thwart Metropolitan's non-judicial foreclosure proceedings, which until 5:05 p.m., December 1, 1980, were proceeding in accordance with the Constitution and laws of the United States and this court's unappealed from order and findings.

For all the reasons set forth in this court's opinion of October 10, 1980, the debtor under the circumstances made known to this court today, may not proceed in this court or any other court under the Bankruptcy Reform Act of 1978. As the savings clause clearly states:

> "(a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act

> as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted." Section 408 of Pub.L. 95-598, Title IV, Nov. 6, 1978, 92 Stat. 2683. *See also* 1978 U.S. Congressional and Administrative News at pp. 5806, 5952, 6244 and 6414.

To this debtor it is as if the Bankruptcy Reform Act of 1978 "had not been enacted." That being the situation, debtor's purported filing of a "Voluntary Petition Under Chapter 11" of the Bankruptcy Reform Act of 1978 is a nullity and is hereby dismissed in its entirety.

Metropolitan Life Insurance Company remains free of this court's orders to continue with its Tuesday, December 2, 1980, non-judicial foreclosure sale of debtor's real property known as the Macon Hilton Hotel.

The Clerk is directed to enter a Rule 58 judgment as to this court's October 10, 1980, opinion and order and as to this opinion and order.

SO ORDERED, this the 2nd day of December, 1980, at 2:56 P.M.

/s/ WILBUR D. OWENS, JR.
Wilbur D. Owens, Jr.
United States District Judge

Filed at 3:00 PM
DEC-2 1980

Clerk, U.S. District Court